

CPUC Res. L-436

RESOLUTION ADOPTING NEW REGULATIONS REGARDING PUBLIC ACCESS TO RECORDS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND REQUESTS FOR CONFIDENTIAL TREATMENT OF RECORDS

Clean Coalition Comments on Revised Resolution L-436

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I. Introduction

The Clean Coalition is a California-based nonprofit project of Natural Capitalism Solutions. The Clean Coalition's mission is to implement policies and programs that accelerate the transition to a decentralized energy system that delivers cost-effective renewable energy, strengthens local economies, minimizes environmental impacts, and enhances energy security.

The Clean Coalition drives policies to remove the top barriers to Wholesale Distributed Generation (WDG), which is defined as renewable energy systems connected to the distribution grid that sell all electricity produced to the local utility and serve only local load. Since local balancing of energy supply and demand is generally required when more than 20% of energy consumption is served by WDG, the Clean Coalition also advocates for policy innovations to support Intelligent Grid (IG) solutions, such as demand response and energy storage.

The Clean Coalition is active in proceedings at the California Public Utilities Commission, the California Energy Commission, the California Independent System Operator, the Federal Energy Regulatory Commission, and other agencies that shape energy policy in California and other states. In addition, the Clean Coalition designs and implements WDG and IG policies and programs at the state, local, and utility level across the country.

The Clean Coalition views the issues of confidentiality and transparency as a high priority. As our focus is on DG and IG solutions, information is critical for planning purposes, especially as it relates to procurement and interconnection. We support this Commission's commitment to consistency with the California Constitution, the California Public Records Act ("CPRA"), and discovery law which require that most government records be available to the public.¹

The Clean Coalition applauds this Commission, and in particular, the Legal Division, for also considering transparency as a priority and wish to continue collaboration as this resolution is revised.

II. Summary of Positions

The Clean Coalition's main points are summarized as follows:

- We strongly support a presumption of transparency and non-confidentiality in all Commission matters;
- The Critical Infrastructure Information Act should not be interpreted to deem information confidential by default;
- Information released by other public agencies previously published should be deemed as non-confidential until a coordinated policy change is adopted among such agencies established by this Commission and intervening parties;

¹ Res. L-436, pg 3.

- Specific information relating to energy procurement should be addressed in more detail, providing transparency with respect to support well-functioning markets;
- Development and incorporation of specific criteria matrices should be discussed and possibly incorporated into the resolution

III. Overall Transparency & Confidentiality Position

The Clean Coalitions' main concern regarding this resolution is access to energy procurement and interconnection documents that are currently deemed confidential by utilities, despite the existing presumption of non-confidentiality. The Clean Coalition affirms the importance of confidentiality where it legitimately relates to ensuring security of grid operation, and protected business or personal information. However, today's economy is extremely information-based. In both planning and evaluation of decisions, access to critical information is essential for successful business operation, well-functioning markets planning, consumer choice and public policy making (the Clean Coalition's primary concern). Transparency is no exception. Transparency is essential for effective oversight of public institutions or regulated monopolies established under public charter or contract. Parties freely and voluntarily engage in business in a publicly regulated sector and must abide by rules established in the public interest when doing so. There is no right or presumption of confidentiality in contracts regulated by the Commission other than as established by the Commission.

The Clean Coalition affirms the importance of determining confidentiality where in each particular instance, it *legitimately* relates to ensuring security of grid operation as well as protected business or personal information. It is crucial, however, to weigh the costs of denying public parties' access to information against the actual needs and benefits related to confidentiality. Where restrictions are truly warranted and measures should be employed to mitigate impact of such restrictions through costs of anonymization and aggregation so as to allow as much useful data as practical to remain accessible. In the current process, the Commission places the burden upon the claimant to show the need for confidential treatment of information. However, without clear guidance and

standards, claims for confidential treatment are broadly and excessively applied with little practical review or recourse.

The Commission should maintain its existing presumption in favor of non-confidentiality, and should only adopt or accept more restrictive policies than already in practice elsewhere deem information confidential when the need for special protection is clearly established. An example of this is individual counties, which typically keep planning and permitting applications public in addition to engaging in open procurement practices. Many public and private utilities regularly publish information including, which include applications and studies. At the same time, claims of confidentiality prevent such information from being freely available to parties in proceedings before the Commission. It is the Clean Coalition's firm position that this resolution should maintain the policy and continue allowing this transparent and free flow of information between parties as a priority in ensuring that this Commission and the regulated industries are as transparent as possible moving forward.

IV. Critical Information Infrastructure Act ("CIIA")

The Clean Coalition does not support allowing regulated industries the ability to deem information confidential by default via the Critical Information Infrastructure Act of 2002 ("CIIA" or "the Act"). The CIIA is an attempt to encourage the sharing of information by private parties with the federal government, by eliminating disincentives those private entities had previously faced when deciding whether or not to submit information to the federal government regarding security vulnerabilities at their facilities. The Act is meant to pertain to "private entities who have submitted information voluntarily to federal agencies."² The Commission is not a federal agency, and therefore the Act will generally not necessarily apply to documents requested by parties in this case, unless received under the act's protection from a federal agency. It is our position that the Commission should be highly cautious in adopting any broad resolutions that can later be abused, and should ensure instead that access to documents is not hindered by rendering information confidential under CIIA by default. This could lead to undue appeals to the regulated

² 6 C.F.R. § 29, *et seq.*

industries are as transparent as possible in this process. Any categorical application of confidentiality should be as specific and very limited as possible to avoid being applied to associated information that does not meet confidential necessity requirements and exemptions to transparency that the CIIA provides.

V. Previously Published Information

A concern brought up by parties and utilities at the June 19th workshop was the concern of information published outside of the Commission proceeding process and software such as Google Earth and related programs allowing the public to view critical areas without the consent of the utilities or this Commission. This issue has already been substantially addressed in civil proceedings related to presumption of privacy. As such, the cost of physically protecting critical facilities from public view should be considered a legitimate operating expense where the Commission determines this in the public interest.

Failing to release information that is already available by other sources does not provide additional security. Rather, it only increases the cost of gathering the information. Any party with sufficient motivation can invest the resources to obtain this information, including physically going to geographic locations or local record offices. As such, increasing the difficulty of obtaining the information, without actually making it inaccessible, only serves to reduce the information available at low cost to the business community and public. This leads to increased costs while simultaneously decreasing access, opportunities, and competition by most market participants in what is no longer a level playing field.

With this in mind, we recommend that this Commission consider adopting a reasonableness test that should be applied to non-disclosure of documents and information:

- a) Information released by other public agencies should be deemed as non-confidential until a coordinated policy is adopted among such agencies;

- b) Information related to the location or nature of facilities does not merit confidentiality when such information is located in plain view.

VI. Information Related to Procurement and Criteria Matrices

As previously stated, our primary concern is that information pertinent to planning, procurement and interconnection should be transparent and is not being made available to parties who have intervened before the Commission for one these topics, even upon request. We realize that the resolution does not specifically address energy procurement at this time, but we believe that it should be addressed in more detail as we proceed in the form of through specific area issue workshops, in the interest of ensuring that this resolution addresses as many specific areas as possible.

As discussed in the June 19th workshop and in this revised resolution, the Commission should develop more discussion surrounding confidential criteria for application in regulatory sectors as needed. Having a very broad resolution leaves much open to individual interpretation, which, as discussed above, could result in overly broad or inconsistent application of standards and hinder the proper functioning of proceedings and interests of parties.

An idea discussed by other parties at the workshop and within this revised resolution was in particular issue areas. We recommend developing specific criteria matrices for each area (e.g. telecom, energy procurement) as in D.06-06-066. Rather than adopt an overarching definition of what is deemed confidential, developing these matrices will ensure that each area will have its own criteria as to what is confidential since criteria for one area may not be relevant to another area. The Clean Coalition sees this resolution as the perfect opportunity to develop and incorporate these criteria matrices into the final adopted resolution in the interest of an easier and streamlined process for the Commission when determining which documents are confidential as well as increasing overall transparency.

VII. **Recommendations and Conclusion**

As we have stated throughout these comments, the Clean Coalition supports the highest level of transparency possible for this Commission and recommends the following:

- This Commission support the increased access to public documents (as discussed in the revised resolution) and recommends ensuring that CIIA is not inappropriately applied so as to hinder this increased access;
- A reasonableness test should be developed to address claims for failure to release information on grounds of confidentiality;
- Workshops should be held to discuss individual regulatory sectors for the development of specific area criteria matrices to be included in this resolution, rather than adopt a broad definition for what is considered confidential.